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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
Open Video Systems	)	

To: The Commission

COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

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The New York City Department of Information Technology and Telecommunications ("City of New York" or "City") submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

I. INTRODUCTION

Section 302 of the Telecommunications Act of 1996[1] establishes a new Part V of Title VI of the Communications Act of 1934.[2] Part V contains new sections 651-653, which permits the provision of video programming by telephone companies and sets forth the general regulatory treatment such services will

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 302, 110 Stat. 56 (approved Feb. 8, 1996) ("1996 Act").

[2] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), codified at 47 U.S.C. § 151 et seq. ("Communications Act").

receive. The specific entry options for telephone companies are set forth in Section 651. Congress gave telephone companies broad flexibility in determining how to enter the video program distribution marketplace in order to "promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs."[3]

Section 652, with some exceptions, limits acquisitions by, and prohibits joint ventures between, local exchange companies ("LECs") and cable television operators that serve the same market. The legislative history indicates that Congress intentionally adopted "the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets."[4]

Finally, Section 653 establishes a new paradigm for telephone company entry into the video program distribution market, the Open Video System ("OVS"). To create competition for incumbent cable television operators generally operating in a de facto monopoly environment, Congress believed that "telephone companies need to be able to choose from among multiple video entry options to encourage entry," and should be "allowed to tailor services to meet the unique competitive and consumer needs of individual markets."[5] Section 653 therefore "focuses on the

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[3] Telecommunications Act of 1996 Conference Report, H.Rep. 104-458, S.Rep. 104-230 at 172 (Feb. 1, 1996) ("Conference Report").

[4] Conference Report at 174.

[5] Id. at 177.

establishment of open video systems by local exchange carriers and provides for reduced regulatory burdens" subject to compliance with certain non-discrimination and other requirements to be established by the Commission.[6]

In the Notice, the Commission seeks comments regarding how it should implement the requirements of the open video system framework. In light of the abbreviated period given the Commission to prescribe such regulations[7] and the similarly short period allowed for comments in the Notice, the City will limit its comments to only those issues of greatest concern to consumers within its jurisdiction.

The City of New York supports the goals of the 1996 Act in creating the Open Video Systems option for telephone companies; i.e.: (1) to promote competition between telephone companies and cable television operators in the video program distribution market; (2) to encourage investment in new technologies; and (3) to maximize the consumers' choice of services that will best meet their information and entertainment needs.

II. DISCUSSION

A. Non-Local Exchange Carriers as Open Video System Operators

New subsection 653(a)(1) of the Communications Act allows an LEC to provide cable service through an Open Video System, but limits others to providing video programming through such a system to the extent permitted by Commission regulations.

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[6] Id.

[7] Communications Act, § 653(b)(1).

The City believes that this distinction is significant and is evident from Congress's use of different words to describe the activities in which different entities are permitted to engage. We consequently believe that the statutory language does not permit cable operators and others to become OVS operators.

Nothing in either the 1996 Act or its legislative history suggests that cable operators should be permitted to become OVS operators. Section 302 of the 1996 Act is entitled "Cable Service Provided By Telephone Companies" (emphasis added). It creates a new Part V in Title VI of the Communications Act that is denominated as "Video Programming Services Provided By Telephone Companies" (emphasis added). The language therein deals exclusively with the operation of OVS and the carriage of video traffic by "common carriers" or "local exchange carriers." Indeed, the Conference Report makes clear that Congress "recognize[d] that telephone companies need to be able to choose from among multiple video entry options" and that the OVS portion of the 1996 Act "focuses on the establishment of open video systems by local exchange carriers."[8]

The City's conclusion regarding the statutory language of Section 653(a)(1) is dictated by the pro-competitive purposes of the 1996 Act. The City, however, reserves its right to comment in reply regarding the competitive or anticompetitive effects of the proposed regulations after arguments are presented by prospective OVS operators.

With respect to what factors should govern the Commission's public interest determination under this subsection,

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[8] Conference Report at 177 (emphasis added).

the City believes the underlying purposes of the 1996 Act provide an excellent guide: (1) competition; (2) diversity of programming sources; and (3) maximum consumer choice. Given the plain language of the statute and its legislative history, as well as the overall competitive goals of the OVS provisions in the 1996 Act, the City believes that cable television operators must be prohibited from becoming OVS operators and only competitive cable operators should be permitted to provide video programming over a LEC's open video system.

Finally, the City believes that the Commission can and should adopt regulations regarding an OVS operator's bundling of services. To enhance competition and provide subscribers with maximum choice, we believe that an OVS operator's services should be unbundled wherever possible and practical.

B. Applicability of Certain Title VI Provisions

Under new subsection 653(c) of the Communications Act, OVS operators are not subject to cable television franchising requirements.[9] Nevertheless, such operators are subject to various other Title VI obligations in accordance with regulations to be prescribed by the Commission. Such obligations include, inter alia, reservation of channel capacity for public, educational, and governmental ("PEG") access[10] as well as

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[9] Communications Act § 653(c)(1)(C).

[10] Communications Act § 611, 47 U.S.C. § 531.

mandatory carriage of local commercial and noncommercial educational broadcast television signals ("must-carry").[11]

Under Title VI, PEG obligations arise out of a negotiated agreements between cable operators and local franchising authorities. Such obligations necessarily vary between franchise areas because community needs and interests and cable system capacity may be dissimilar in different jurisdictions. The Notice seeks comment on how PEG obligations should be established in the absence of a franchise requirement, given the statute's direction that such obligations be imposed on OVS operators to an extent no greater or lesser than that imposed on cable television operators.[12]

The City believes that an OVS operator must be required to design its system in such a way that it is capable of duplicating the incumbent cable operator's PEG obligations in each cable franchise jurisdiction in which the OVS operator provides service.[13] In light of the statute's direction that such obligations be imposed to the same extent as on competing cable television operators and the reality of PEG obligations that vary among franchise areas, the City finds it difficult to imagine another equitable solution to this issue. Consequently, we believe this requirement must apply equally to OVS operators

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[11] Communications Act §§ 614 and 615, 47 U.S.C. §§ 534 and 535.

[12] Notice at para. 57.

[13] The OVS operator should also be required to adjust its PEG obligations to match the obligations in a cable operator's renewed cable franchise.

whose systems overlap several franchise jurisdictions with different PEG obligations.

The OVS operator should be required to match the PEG obligations of the cable operator in a franchise area, including any adjustments to the cable operator's obligations resulting from a cable franchise renewal, modification, or any other reason. The Commission should grant local cable franchising authorities the right to establish the PEG requirements an OVS operator must meet in order to match the local cable operator's obligations, and to notify the OVS operator of such requirements. Franchising authorities should be granted flexibility in determining the mix of PEG obligations that would match the local cable operator's obligations. Such flexibility is desirable in order to, among other things, promote the public interest in PEG access and avoid any unnecessary duplication of PEG facilities, equipment, and support.[14] So long as the overall package of PEG support an OVS operator must provide does not exceed the package provided by the cable operator, the franchising authority should have the right to establish the components of such package.

The Commission also seeks comment from franchising authorities in particular regarding any equipment specific to

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[14] For instance, if a cable operator is required to build a PEG studio, an OVS operator should not necessarily be required to build a studio if the franchising authority does not believe the franchise area needs an additional studio. Instead, the franchising authority should have the flexibility to, among other things, require the OVS operator to interconnect its system to the cable operator's system in order to carry PEG access programming originating from the existing studio and to provide an in-kind payment equal to the value to the studio. Such payment would then be available to fund the development of PEG programming or other PEG-related activities that respond more directly to community needs and interests.

open video systems that may be needed to have their PEG programming delivered over such systems.[15] Inasmuch as no OVS systems currently exist, and no design architecture is currently available for our review, the City is presently unable to say what equipment is necessary. We therefore believe that the Commission should require an OVS operator to provide whatever equipment compatible with its system is necessary to permit PEG programming to be delivered over the system.

Finally, the Notice seeks comment regarding the overall applicability of must-carry and retransmission consent in the context of open video systems.[16] To ensure that every subscriber can receive the must-carry channels, the City believes that the OVS operator, as the system designer, must be responsible for ensuring that this is the case. The Commission can and should require OVS subscribers to purchase a basic package of must-carry and PEG channels in the same manner that cable television subscribers are required to purchase a cable system's "basic tier." We believe that this would equitably apply the statutory mandate.

With regard to how must-carry and retransmission consent stations should be defined for open video systems that span multiple television markets, the City believes that all the regulatory and statutory obligations applicable to cable operators must apply equally to OVS operators in each franchise jurisdiction and television market in which they provide service. The OVS operator should be required to design its system to

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[15] Notice at para. 58.

[16] Notice at para. 59; See 47 C.F.R. §§ 76.51-76.64.

comply with all Title VI requirements applicable to each jurisdiction it serves, including the number of such stations, their channel position, and signal availability provisions. Were such not the case, OVS operators would be subject to greater or lesser obligations than the competing cable operators in the various jurisdictions the OVS operator was serving, contrary to the mandate of the 1996 Act.[17]

III. CONCLUSION

For the foregoing reasons, the City recommends that to promote competition, encourage investment, maximize consumer choice, and protect the public interest: (1) cable television operators must be prohibited from becoming OVS operators; (2) OVS operators must be required to design their systems in such a way that they are capable of duplicating the incumbent cable operator's PEG obligations in each cable franchise jurisdiction in which the OVS operator provides service; (3) the Commission should require OVS subscribers to purchase a basic package of must-carry and PEG channels in the same manner that cable television subscribers are required to purchase a cable system's "basic tier"; and (4) OVS operators should be required to design their systems to comply with all Title VI requirements applicable to each jurisdiction they serve.

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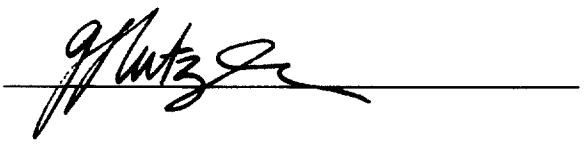
[17] See Communications Act § 653(c)(2)(A).

Respectfully Submitted,

NEW YORK CITY DEPARTMENT OF
INFORMATION TECHNOLOGY AND
TELECOMMUNICATIONS

By: 

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